Supreme Court, U.S.
FILED

96 163 JUL 3 1 1996

No. OFFICE OF THE CLERK

In The

Supreme Court of the United States

October Term, 1995

NICHOLAS DALIS,

Petitioner,

v.

STATE OF CALIFORNIA,

Respondent.

Petition For A Writ Of Certiorari To The Supreme Court Of The State Of California

PETITION FOR WRIT OF CERTIORARI

LAWRENCE A. GIBBS
GROSSMAN & GIBBS
1510 Fourth St.
Berkeley, CA 94710
(510) 524-4141

Counsel for Petitioner

COCKLE LAW BRIEF PRINTING CO., (800) 225-6964
OR CALL COLLECT (402) 342-2831

53 pp

QUESTION PRESENTED

Whether a judge violates due process by withdrawing a proposed probationary sentence in apparent response to intense and personal media criticism?

PARTIES TO THE PROCEEDINGS

All the parties are listed in the caption.

TABLE OF CONTENTS

Page

QUESTION PRESENTED..... i

PARTIES TO THE PROCEEDING ii

TABLE OF AUTHORITIES..... iv

OPINIONS BELOW..... 1

JURISDICTION..... 1

CONSTITUTIONAL PROVISIONS INVOLVED..... 1

STATEMENT OF THE CASE..... 2

REASONS FOR GRANTING THE PETITION..... 18

CONCLUSION 25

APPENDIX

APPENDIX A: UNREPORTED OPINION OF THE CALIFORNIA COURT OF APPEAL, People of the State of California v. Nicholas Dalis, No. H011418, entered February 20, 1996.....A1

APPENDIX B: ORDER OF THE CALIFORNIA COURT OF APPEAL denying Petition For Rehearing, entered March 6, 1996 .....B1

APPENDIX C: ORDER OF THE SUPREME COURT OF THE STATE OF CALIFORNIA denying Petition For Review, entered May 15, 1996.....C1

TABLE OF AUTHORITIES

Page

Federal Cases

Bracy v. Gramley, 81 F.3d 684 (7th Cir. 1996) 23

Bridges v. California, 314 U.S. 252 (1941) 19, 20, 21

Connolly v. Georgia, 429 U.S. 245 (1977) 19

Craig v. Harney, 331 U.S. 367 (1947) 20, 24

Estes v. Texas, 381 U.S. 532 (1965) 19, 21, 23

Irvin v. Dowd, 366 U.S. 717 (1961) 19

Murphy v. Florida, 421 U.S. 794 (1975) 19, 21

Patterson v. Colorado, 205 U.S. 454 (1907) 18, 24

Pennekamp v. Florida, 328 U.S. 331 (1946) 20

Sheppard v. Maxwell, 384 U.S. 736 (1966) 19, 21

Sullivan v. Louisiana, ___ U.S. ___, 113 S. Ct. 2078 (1993) 22, 24, 25

Tumey v. Ohio, 273 U.S. 510 (1927) 19, 22, 23, 24, 25

Ward v. City of Monroeville, 409 U.S. 57 (1972) 19

State Cases

Gordon v. Justice Court, 525 P.2d 72 (Cal. 1974) 21

Federal Statutes

28 U.S.C. § 1257 1

State Statutes

Cal. Penal Code § 1203.045 ..... 3, 16

PETITION FOR A WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF CALIFORNIA

Petitioner, Nicholas Dalis, hereby petitions for a writ of certiorari to review the judgment of the California Court of Appeal affirming petitioner's conviction and sentence.

OPINIONS BELOW

The opinion of the California Court of Appeal is not reported, and is reproduced in Appendix A. The unreported order of the California Court of Appeal denying the Petition for Rehearing appears in Appendix B. The unreported order of the California Supreme Court denying the Petition for Review appears in Appendix C.

JURISDICTION

The California Court of Appeal entered its opinion in this case on February 20, 1996. That court denied the Petition for Rehearing on March 6, 1996. The California Supreme Court denied the Petition for Review on March 15, 1996. Petitioner has filed this petition within 90 days of that date. This Court has jurisdiction under 28 U.S.C. § 1257.

CONSTITUTIONAL PROVISIONS INVOLVED

Section 1 of the Fourteenth Amendment to the United States Constitution provides, in relevant part, that:

> . . . nor shall any State deprive any person of life, liberty or property, without due process of law. . . .

STATEMENT OF THE CASE

This appeal presents the question of the influence of the media on a sentencing decision of a judge of the superior court. As it wended its way through the courts, petitioner's "white collar" criminal case was extensively covered in hundreds of articles by the San Jose Mercury News. In open court on February 25, 1993, the trial judge explained his deliberate and considered decision to place petitioner on probation with the condition that he perform community service. The judge concluded the hearing by stating, "If I made a mistake, I've made a mistake. It's my mistake reached all by myself in a sincere effort to do what, in my perception, is a reasonable sentence in this case. I fully expect to be castigated by some. I'll tell you this, gentlemen, I'm very comfortable with this sentence as long as it's implemented the way I kind of outlined it." Details of the probation plan were "to be ironed out" at a subsequent proceeding.

The judge was not prepared for the intensity and personal nature of the ensuing castigation. In a series of 36 editorials, columns, front-page articles, and letters to the editor, the San Jose Mercury News excoriated the judge, lambasted his sentence and demanded that petitioner be sentenced to prison.

In subsequent hearings, the judge took extensive note on the record of the media criticism of his proposed

sentence. Then on May 10, without any new facts coming to light about petitioner or his crime, the judge did an about-face and sentenced petitioner to three years in state prison. After pronouncing sentence, the judge took the unprecedented step of directly castigating, on the record in open court, the columnist who had been so highly critical of the judge's proposed sentence.

The case presents a single issue for review: whether the judge's apparent capitulation to media pressure in violation of due process can ever be deemed harmless error. As the judge himself stated in open court when he changed his sentence and remanded petitioner to state prison, petitioner "could legitimately wonder did that newspaper campaign subsequent to the first sentencing date of February 25th influence me." Answering his own question, the judge replied, "the only person that knows that is me."

Due process requires more.

A. Underlying Facts

1. Proposed Probationary Sentence

Petitioner, Nicholas Dalis, the former president of the Garden City card club, was charged with fraud, theft and various tax violations in connection with the club's finances. On January 22, 1993, Mr. Dalis pleaded guilty to most of charges, as did nine other defendants. Every major defendant, including petitioner, admitted to the allegation of excessive taking, which limited probation to "unusual circumstances." *See* Pen. Code § 1203.045. At the February 25, 1993 sentencing, Judge McInerny found

unusual circumstances and granted probation in the cases of petitioner's co-defendants, citing either their advanced age or ill health. As to petitioner's sentence, Judge McInerny stated:

> What I'm going to do is tell you what I am going to do to him. I've made up my mind, and I am prepared to proceed with sentencing . . . I told [counsel] yesterday I didn't know what I was going to do with Mr. Dalis. I have thought about it a great deal since we were together yesterday I guess on the theory, gentlemen, isn't going to get any easier 30 days from now[.] [T]he general idea of what I told you I had began to come into fruition last night.

The court noted the probation department recommended a four year prison term. Petitioner's counsel pleaded for probation on the grounds that the scheme had been foisted on a youthful petitioner by senior officers, that petitioner was not a danger to the community, and that, as attested by the some 500 letters of support, he had long devoted himself to helping others and to the betterment of the community. The prosecutor urged a prison sentence. The judge reviewed the vast number of favorable letters he received. He then stated:

> I have the ability . . . to keep my finger on Mr. Dalis for a long time. What we're going to do, Mr. Robinson, is going to require a little bit of creative thinking on your part. We're probably going to have a subsequent hearing to iron out the details. Mr. Dalis, if I sentenced you right now, which I'm not for technical reasons your attorney will understand, I would suspended [sic] imposition of sentence on you and I would place you on probation. I'll figure out the

> reasons in a few minutes as far as the technical reasons are concerned. But basically this is an unusual case as far as I'm concerned. Both from the size of the theft, but also in the manner which it was conducted with the significant contributions which you've made to society in the past either directly or indirectly. Further, because possibly you were led into this initially, at least, by somebody else, there is that suggestion in the record[.] As a condition of probation [you are] not going to do community service by going down to one of the local places Mr. Robinson was mentioning to me and do what the other defendants are going to do and then go home every night and live in the same place where you live now. What you're going to do, Mr. Dalis, is you're going to go someplace that's as disagreeable as I can figure out. And for one year, you're going to live there. And you're going to get down and literally shovel out stables and that's going to be your year of community service.

The court then set the case for "the next hearing," giving petitioner's counsel three weeks to return with a suitable program. In closing, the judge observed

> "If I made a mistake, I've made a mistake. It's my mistake reached all by myself in a sincere attempt to do what, in my perception, is a reasonable sentence in this case. I fully expect to be castigated by some. I'll tell you this, gentlemen, I'm very comfortable with this sentence as long as its implemented the way I kind of outlined it."

2. The Media Erupt

The Garden City case had been covered extensively by the media, and particularly by the San Jose Mercury News (the "Mercury News").[1] On February 26, 1993, the day following the trial court's announcement that petitioner would be placed on probation, the front page of the Mercury News carried a story entitled, "JUDGE LETS CARD-ROOM OFFICIALS AVOID JAIL". The article began, "Former Garden City President Nicholas J. Dalis, who could face 10 years in prison on profit-skimming and contribution-laundering charges, is more likely to be sentenced to community service. . . . " The article quoted the city police chief's criticism of the sentence. The prosecutor was quoted as stating, "I've never had a sentence like that handed out."

The next day, the Mercury News carried a story on the front page of its "Local" section, entitled, "LETTERS INUNDATED GARDEN CITY JUDGE." It began, "When nine Garden City card club owners and employees stood in court for sentencing Thursday, it was clear that years of political and charitable contributions, volunteerism, rubbing elbows with the right crowd, and just plain schmoozing had paid off." Criticism of the probationary sentence came from every quarter. The police chief, said he was "shocked" and would tell the judge so if the prosecutor asked him to. A lawyer for Pestana said the judge is "giving an hour of volunteer work per $1000 they stole. It just boggles the mind." A representative of

---

[1] The Court of Appeal took judicial notice of some 36 articles which appeared in the San Jose Mercury News.

the Franchise Tax Board was quoted as saying he would expect "state prison up to the maximum allowed by law." A sub-title read, "What's Going On Here?"

Widely-read Mercury News columnist Jim Trotter weighed in on February 28 with a piece entitled, "SAN JOSE JUSTICE: COMMIT FELONIES, DO VOLUNTEER JOBS." He condemned Judge McInerny for engaging in two standards of justice, one for the rich and one for the poor. Said Trotter,

> "the whole idea that someone could plead guilty to grand theft, conspiracy to defraud, fraudulent tax returns and violations of campaign contribution laws and not even be considered for jail – even though jail is mandated by state law – seems absurd. Unless, perhaps, that person is incredibly well-connected, a lifelong friend and contributor to local politicians, and the big cheese in a gambling emporium that feeds the city millions in yearly tax money."

The story hit the top of the editorial page on March 2, 1993. In the lead editorial, entitled "DIRECTLY TO JAIL; JUDGE WELL KNOWS WHERE HE SHOULD SEND NICK DALIS", the paper took on the judge directly and personally. "Pity poor Judge John S. McInerny," the editorial began. It continued:

> "The law says Garden City defendant Nick Dalis should go to jail for up to 10 years for the crimes he committed . . . But McInerny doesn't want to send Dalis to jail. He told Dalis' lawyer to come up with some unusual circumstances to 'get me out of this hole' – the hole being his obligation to enforce the law.

"There's only one unusual circumstance here: Dalis' friends – the rich and powerful of San Jose. Business, civic and political leaders have winked at the Garden City crimes all along, and now hundreds have sent letters to the judge on Dalis' behalf. Some are pals of the judge as well.

"So last week McInerny blustered that instead of sending Dalis to jail, he'd make him 'suffer' by shoveling out stables or – gasp – working with poor people. What a joke.

"No, jail would not rehabilitate Nick Dalis. Jail rarely rehabilitates anyone. The issue here is the different standard applied to thieves like Dalis and thieves who have no money of their own and no friends in high places.

"The Garden City is a gold mine. Dalis didn't need to steal to get rich. His was a premeditated crime of pure greed.

"He belongs in jail, and McInerny knows it."

On March 17, Trotter's column turned up the heat with the headline, "READERS ASK HOW DALIS RATES NO PRISON TERM." Trotter wondered "how the mail is running at Superior Court since Judge John S. McInerny announced community service in the East as a likely punishment for card-club crook Nick Dalis." Trotter observed that his mail, sent by readers who had not apparently received political contributions from the Garden City, indicates that "prison is far more instructive about the perils of crime than a day job in some Eastern town." Trotter quoted excerpts from letters written by persons "just plain concerned about the seeming double

standard for the affluent and politically connected Dalis." One writer observed, "Here we have extremely greedy people committing felonies being allowed to go free without any jail time. Justice should not be a popularity contest. The smell is atrocious."

On the morning of April 1, the day petitioner was to return to court, the front page of the Mercury News ran the headline, "A JUDGE'S DILEMMA, CARD CLUB CASE DEALS McINERNY A HAND HE HAS TO PLAY." The story profiled the judge's life on the bench, and the maelstrom created by the sentence he announced for petitioner on February 25. The article itself stated that

> "In newspaper columns and letters that followed, critics said they were shocked to hear McInerny discuss what sounds like a wrist slap for a man convicted of a $3.9 million fraud. [¶] Many seem especially outraged by the suggestion of leniency for a defendant whose family has long cultivated its political and social ties to the old-line power structures of Santa Clara Valley."

The article stated that judges and attorneys were not willing "to publicly second-guess McInerny's comments about sentencing Dalis . . . But privately," said the article, "even some of McInerny's peers on the bench were sharply critical of his reasoning, saying they felt his remarks were insensitive to the concept of equal justice for rich and poor." The article quoted critics of the judge as charging that he "is displaying inappropriate sympathy for a defendant who comes from the same economic and social milieu." One fellow-judge was quoted as saying, "It's sort of a classic outcome in a white-collar case.

. . . When judges look at people of their own social class, they think it's a waste to send a guy off to prison. It's never that way when they look at a guy charged with burglary or rape, if the defendant is not from the middle class."

3. The May 1, 1993 Proceeding

Judge McInerny continued the matter on May 1st. After setting a new date, the judge made extensive remarks in open court about the media's assault on his integrity in the wake of his February 25th remarks. Referring elliptically to Jim Trotter's March 17, 1993 column inquiring "how the mail was running at superior court," the judge stated:

> "I've received some correspondence, Mr. Dalis, regarding the last time we were in court together. A question was raised perhaps rhetorically, maybe perhaps esoterically [sic], about how the letters were running . . . There have been 30 letters received which I basically will, basically say express some concern about various aspects of my mental health ischemic brain disease I'm suffering. I had to look that one up. There are several others that seemed to suggest that I am reserving my right for a reelection campaign fund."

Although the letters addressed to the court on petitioner's behalf had not been made public, Judge McInerny disclosed that several people had written to suggest that he was being pressured by the "power elite of San Jose . . . One unnamed, undesignated writer referred to as my 'pals' that wrote me." The judge was

perhaps referring to the March 2, 1993 editorial in the Mercury News in which it was suggested that the only unusual circumstance in the case was that the "rich and powerful of San Jose" had sent hundreds of letters to the judge, and that "Some [of the writers] are pals of the judge as well."

This accusation prompted Judge McInerny to review the letters in open court. He stated that of the 252 writers, he personally knew only 14 of them. "There are five of them, maybe six, that I could say are friends of mine." The judge then recited the dictionary definition of "pal," which he found to be "a close, intimate friend." Based on this definition, the judge stated that "There are no pals that have written me, Mr. Dalis."

The judge concluded his remarks in this way:

> "But if the people who are going to write to me in the future or those who are going to do something to cause them to write to me, I do wish they'd also indicate that they're not my pals and they're not prominent politicians because it carries the unfortunate implication for some of the people who serve in political offices in this area."

4. The Media Storm Continues

The afternoon papers on April 1, 1993, reported on the front page of the local section that petitioner's sentencing had been continued. A box on the same page carried the headline, "PROFILE: JUDGE McINERNY PUT HIMSELF AT THE CENTER OF THE STORM." The article stated that Judge McInerny "finds himself at the center of

a public firestorm over his handling of one of the biggest corruption scandals in local history: the Garden City card club case." The article repeated criticisms leveled by unidentified local judges.

In a follow-up article on April 2, the Mercury News chronicled the public criticism which "questioned whether the judge had been improperly influenced by the outpouring of support [for petitioner]." The article reported that "McInerny rebutted the public criticism in a speech from the bench."

The April 8, 1993 edition of the Mercury News treated its readers to another editorial entitled "NICK DALIS, GEE, WHAT A WONDERFUL THIEF!" This one began: "Judge John S. McInerny didn't want to send Garden City defendant Nick Dalis to jail for stealing $3.9 million, so he told Dalis' lawyer to find some extenuating circumstance to get around the state's sentencing law – to 'get me out of this hole,' as he put it. Apparently it was a deeper hole than he thought, and the lawyer is having trouble finding a rope." The editorial predicted that the judge will spend a whole day on April 27 "listening to teary-eyed testimonials from Dalis' moneyed friends and beneficiaries of his charity. [¶] Poor thieves seldom have rich, articulate pals. They seldom have extra loot to give to charity. Poor thieves go to jail. [¶] Maybe McInerny will be able to climb out of his hole on the testimonial rope, but it's looking pretty frayed from here."

5. The April 27, 1993 Probation Hearing

Twenty-five witnesses testified on behalf of a grant of probation for petitioner. They recounted his many acts of charity, both public and private, and described the many hours he had devoted to the betterment of the community. The People put on no witnesses and introduced no evidence.

At the conclusion of the testimony, Judge McInerny once again addressed the parties and spectators on the subject of the letters and publicity. He reiterated that many letters had been concerned "with various aspects of my virility my – my mental health, my intelligence, they're not very complimentary to me, they didn't have an awful lot to do with you [petitioner]." The judge assured Mr. Dalis, however, that "judges in general, certainly this judge, doesn't sentence by public opinion."

6. The Mercury News Renews The Offensive

The following day, columnist Jim Trotter renewed his attack on petitioner and Judge McInerny. In a column entitled, "DALIS FANS SKIM OVER CRIMES TO OFFER PRAISE," Trotter described the probation hearing thus:

> "As Nick Dalis sat in Superior Court Tuesday, he was buffeted by the gentle winds of gratitude from a legion of profound admirers. Trotter pointed out, however, that "the county probation department has suggested a term of four years in its report. [¶] Judge McInerny, who has professed a reluctance to send Dalis to jail, delayed sentencing until May 10. The judge said he wouldn't implement the sentence, whatever

> it is, until the fall. [¶] We shall see what we shall see. [¶] Eventually, perhaps."

The same day, a piece ran on the front page of the Local section of the Mercury News, entitled "JUDGE DELAYS DALIS SENTENCING – GARDEN CITY CARD CLUB EXECUTIVE'S SUPPORTERS URGE THAT HE SERVE NO JAIL TIME." The article described the "sometimes tearful testimony about [petitioner's] philanthropy, generosity and kindness," but reported that Judge McInerny may be leaning toward "some kind of prison time." A few days later, on May 2, 1993, Trotter ran another column about petitioner captioned, "A GREATER PERIL TO SAN JOSE'S BODY POLITIC." This column pointed out the harm petitioner caused to the political system by conspiring to avoid the local campaign laws. Trotter said, "I don't know if the club bought influence. But I doubt that they broke that particular law out of a sense of civic responsibility." The Mercury News also kept the pressure on by publishing various letters to the editor that were highly critical of Judge McInerny's indicated sentence. One letter was entitled, "IF DALIS DID THE CRIME, HE SHOULD DO THE TIME," and urged a prison sentence despite the fact that "Dalis has lots of money and influence . . . [and] . . . is very kind and generous to his friends and supporters." On May 6, 1993, four days before petitioner's sentencing, the front page of the Mercury News reported that "TWO MORE EXECS OF GARDEN CITY AVOID SERVING TIME IN JAIL." The story, which described the probationary sentences of co-defendants Henry Schiro and Gary Rovai, observed that "The sentences mean none of the 10 Garden City defendants found guilty so far has been ordered to serve a

single day of jail time." Petitioner's sentencing, said the article, was set for May 10. In a box captioned, "PENALTIES AND REASONS," the paper reported "the sentences imposed so far by Superior Court Judge John S. McInerny in the Garden City case and the reason each defendant avoided jail time. The club's chief executive, Nicholas J. Dalis, will be sentenced Monday."

7. The May 10, 1993 Sentencing

Defense counsel asked Judge McInerny to impose the sentence he had intended on February 25. Judge McInerny denied probation and sentenced petitioner to a term of three years. The court explained its decision as follows: "I'm sending you to prison Mr. Dalis for a very simple reason, the size and the magnitude and the number and the length of your offenses has convinced me that the only really appropriate sentence for you, is incarceration at the state level."

The judge understood he had some obligation to justify his departure from the February 25th sentence. He therefore explained:

> "You can well wonder why I've changed my mind and its very simple. I knew almost as I was musing that day on the 25th in open court that I was making a mistake. The language that I used when I read it myself shows me to myself, that I was struggling with the concepts and I was beginning to realize that I was making a mistake.
>
> "What I did in simple terms was I was looking too closely at you, the man, and I was not looking closely enough at the crimes."

Regarding the probation ineligibility clause, the court stated that "I'm not sending you to prison because I have no other choice." Although petitioner's conduct did not fit any of the "usual categories" of "unusual circumstances" under Penal Code section 1203.045, the court stated that it was "not considering you completely ineligible for probation." Nonetheless, the "magnitude of the crime" was determinative.

The court then turned to the role of the media in the judge's reconsideration of his February 25th sentence:

> "Now, Mr. Robinson has mentioned the fact that the newspaper, a newspaper has been very – how should we say interested in your case. And you could legitimately wonder did that newspaper campaign subsequent to the first sentencing date of February, of February 25th, influence me, of course Mr. Dalis the only person who knows that really is me. But I'll tell you a couple of things, number one, the constitution of the United States guarantees the people of this country a free press. It doesn't guarantee them a fair press.
>
> "And number two, secure in the knowledge I read one time in the San Jose Merc on the comic page, that one should never pick a fight with a person who buys his ink by the barrel.
>
> "Having that Twainsian thought in mind, nonetheless, I make the following comment to those people who pick their – buy their printer's ink by the barrel, Mr. Dalis the editor of the editorial pages of the San Jose Mercury and the columnist who has indicated such a very great interest in you, could not influence me to pick a particular flavor of jelly bean out of a candy

dish much less whether I send you to prison or not.

"As a matter of fact, when I read the last column, Mr. Trotter, I'm reminded of a comment that I read almost thirty-five or forty years ago, I don't mind it so much that you make fun of me, I don't mind it so much that you make fun of Mr. Dalis, but when you make fun of the people who come into court and who sincerely tell me how highly they regard him, as you did, the person I thought of was the comment of Mr. Welch, to a United States Senator, have you no shame, sir?"

8. The Media Postscript

The next day, Jim Trotter's column entitled "DALIS PENALTY BRINGS JUSTICE BACK INTO FOCUS," applauded the judge's ruling, but blamed the "public criticism and ensuing media attention" on the judge's conduct. The lead editorial on May 12 concurred, stating "THREE YEARS IS A JUST SENTENCE AMID GARDEN CITY MUDDLE." The editorial commended Judge McInerny for doing "the right thing" despite the fact that his "verbal contortions over sentencing were wild enough to land him a job with Ringling Brothers."

B. The Court Of Appeal Decision

Petitioner argued on direct appeal that the media pressure on the judge, together with the judge's manifest concern with that criticism, deprived him of due process. The Court of Appeal rejected the argument, though it

acknowledged that "[i]nitially one might believe there was a reasonable probability the trial judge had been influenced by the adverse publicity by the Mercury News." App. A., at 20. The court concluded, however, that the error was harmless because the record did not demonstrate that petitioner's case was sufficiently unusual to overcome the presumption against probation for excessive takings. App. A., at 20-21. The court's entire analysis is contained in the following passage:

> Though the trial court stated it did not consider Dalis completely ineligible for probation on May 10, it offered no basis for granting probation and none exists in the record. [¶] Based on these facts, we conclude it is not reasonably probable the media influenced the judge's sentencing decision. Rather, as he admitted on May 10, the judge realized he had made a mistake at the February 25th hearing.

Id.

REASONS FOR GRANTING REVIEW

"The theory of our system is that the conclusions to be reached in a case will be induced only by evidence and argument in open court, and not by any outside influence, whether of private talk or public print."

> – Justice Oliver Wendell Holmes
> *Patterson v. Colorado*, 205 U.S. 454, 462 (1907)

"Here there was a real and substantial manifestation of an endeavor to exert outside influence. A powerful newspaper brought its full

> coercive power to bear in demanding a particular sentence. If such sentence had been imposed readers might assume that the court had been influenced in its action; if lesser punishment had been imposed, at least a portion of the community might be stirred to resentment. It cannot be denied that even a judge may be affected by such a quandary."
>
> – Justice Felix Frankfurter
> *Bridges v. California*, 314 U.S. 252, 300 (1941)

This petition, involving the impact of media pressure on a judge's sentencing decision, requires the Court to chart a previously unexplored area that lay at the confluence of two lines of cases. To date, most decisions of this Court regarding the impact of publicity in the trial process have been limited to its effect on jury panels. *E.g., Murphy v. Florida*, 421 U.S. 794 (1975) (pretrial publicity surrounding crime and prior convictions); *Sheppard v. Maxwell*, 384 U.S. 736 (1966) (television coverage of trial); *Estes v. Texas*, 381 U.S. 532 (1965) (carnival atmosphere during trial from press coverage); *Irvin v. Dowd*, 366 U.S. 717 (1961) (pretrial press coverage). The Court's due process decisions regarding the bias of judges, on the other hand, have primarily focused on the warping effects of a judge's pecuniary interest in the outcome of matters submitted. *E.g., Tumey v. Ohio*, 273 U.S. 510 (1927) (mayor who sat as justice of the peace and whose salary was paid from fines imposed had impermissible pecuniary interest); *Ward v. City of Monroeville*, 409 U.S. 57 (1972) (mayor who presided in traffic court and who was responsible for municipal finances had impermissible pecuniary interest in maintaining high level of fines); *Connolly v. Georgia*, 429 U.S. 245 (1977) (magistrate who is paid only

for issuing search warrants had impermissible pecuniary interest).

This Court has not, however, considered the circumstances under which media pressure on a judge's sentencing decisions may result in a violation of a defendant's due process rights. The question has unfortunately arisen with increasing regularity as media scrutiny of judicial proceedings and decisions increases, and as judges have become sensitized to the prospects of contested elections. These two developments have induced many judges not only to do justice in the courts of law, but to appear to have done justice in the court of public opinion.

The phenomenon is not new, but it has been given great impetus by a line of this Court's decisions which effectively withdrew the power of lower courts to prevent, through contempt proceedings, media intrusion into the trial process. *See Bridges v. California*, 314 U.S. 252 (1941); *Pennekamp v. Florida*, 328 U.S. 331 (1946); *Craig v. Harney*, 331 U.S. 367 (1947). Justice Felix Frankfurter, who gave perhaps as much thought as any jurist to the problem of reconciling media pressure and the right of a defendant to a fair trial,[2] correctly prophesied that evisceration of the contempt power would yield precisely the sort of "trial by newspaper" (*see Pennekamp*, 328 U.S. at 359-360) that petitioner encountered. Having lost the power to control the press during trial through the contempt power, the courts have been left only with the tool

---

[2] See his opinions in *Bridges v. California*, 314 U.S. 252, 279-305 (Frankfurter, J., dissenting); *Pennekamp v. Florida*, 328 U.S. 311, 350-369 (Frankfurter, J., concurring); and *Craig v. Harney*, 331 U.S. 367, 384-394 (Frankfurter, J., dissenting).

of post-trial review to vindicate a defendant's right to a tribunal free from "intimidation with respect to specific matters still in judicial suspense. . . . " *Bridges*, 314 U.S. at 291 (Frankfurter, J., dissenting). It is imperative that this device maintain a sharp edge, lest defendants lose both prospective and retrospective remedies against "the verdict of a mob." *Murphy v. Florida*, 421 U.S. at 799.

There is a powerful inference that media pressure of the sort that concerned Justice Frankfurter (and concerned the entire court in *Sheppard* and *Estes*) influenced the sentencing decision in petitioner's case. The facts clearly show four things: that Judge McInerny deliberately and finally determined petitioner's sentence on February 25; that there ensued a media campaign of unparalleled intensity, ridiculing the judge for his sentence and vilifying petitioner; that no new facts about petitioner or his offense came to the judge's attention; and that after taking due note of the media campaign on the record at three separate hearings the judge changed his sentence. The judge's persistent on-the-record attention to the media campaign dispels any presumption that he acted solely on the basis of proper motives.

The California Court of Appeal found no due process violation essentially on the theory that whatever publicity was brought to bear on the judge amounted to harmless error. The test, said the court, was that found in the California Supreme Court's decision of *Gordon v. Justice Court*, 525 P.2d 72, 76 (Cal. 1974), which required a defendant complaining of a due process violation to show "a reasonable probability of prejudice." App. A., at 19. The Court of Appeal acknowledged that "[i]nitially one might believe there was a reasonable probability the trial judge

had been influenced by the adverse publicity by the Mercury News." *Id.* at 20. It decided otherwise, however, because the record did not demonstrate that petitioner's case presented "unusual circumstances" to overcome the presumption against probation for excessive takings. *Id.* at 20-21. The Court of Appeal thus effectively concluded that, because no rational judge would have found petitioner eligible for probation, it was not reasonably probable that the judge's apparent (or even actual) bias mattered.

A harmless error analysis of the sort employed by the Court of Appeal's in petitioner's case severely blunts whatever sharp edge remained of post-trial review for due process claims arising from media pressure. It also conflicts with this Court's recent decision in *Sullivan v. Louisiana*, ___ U.S. ___, 113 S.Ct. 2078 (1993), which clarified that certain errors at trial are "structural," and therefore subject to automatic reversal. Thus, the Court stated in *Sullivan* that "[a]lthough most constitutional errors have been held amenable to harmless-error analysis [citation], some will always invalidate the conviction. *Id.* at 2081 (citations omitted). The Court listed the type of errors that compel automatic reversal, one of which was "trial by a biased judge." *Id.*, citing *Tumey v. Ohio*, 273 U.S. 510.

As noted above, in *Tumey* this Court reversed convictions rendered by a town mayor who received fees and costs of approximately $12.00 for every conviction. A unanimous court held that due process was offended by "every procedure which would offer a possible temptation to the average man as a judge to forget the burden of proof required to convict the defendant, or which might

lead him not to hold the balance nice, clear, and true between the state and the accused denies the latter due process of law." *Id.* at 532. Under *Tumey*, reversal is thus automatic not only for actual bias, but upon a lesser showing, i.e., "a possible temptation so severe that we might presume an actual, substantial incentive to be biased," *Bracy v. Gramley*, 81 F.3d 684, 689 (7th Cir. 1996).

While the automatic reversal rule of *Tumey* arose in a context of a judge's pecuniary interest in the outcome of an adjudication, there is no reason to so limit its scope. The rationale in *Tumey* should be equally applicable to a judge who is tempted to tailor his or her rulings to the prevailing public opinion. This Court has quite clearly stated that whatever immunities judges might otherwise possess, judges have not escaped human nature. *Estes* reminded us that

> "Judges are human beings also and are subject to the same psychological reactions as laymen . . . Our judges are high-minded men and women. But it is difficult to remain oblivious to the pressures that the news media can bring to bear on them both directly and through the shaping of public opinion."

(*Estes v. Texas, supra,* 381 U.S. at p. 548-549.)

Justice Frankfurter put it best:

> "Even a conscientious judge not a layman, and not merely one serving under a short judicial tenure, may find himself in a dilemma when subjected to a barrage pressing a particular result in a case immediately before him. . . . The demands found to have been made upon the judge by these [news]papers may agitate even a

> conscientious judge. He may himself be unaware of the extent to which his powers of reason have not the sway they would otherwise have . . . Judges are not merely habitations of bloodless categories of the law which pursue their predestined ends."

Craig v. Harney, 331 U.S. 367, 392 (1947) (Frankfurter, J., dissenting). See also *Patterson v. Colorado*, 205 U.S. at 462-463. Justice Robert Jackson similarly decried the

> "myth that judges are not as other men are, and that therefore newspaper attacks on them are negligible because they do not penetrate the judicial armor . . . I do not know whether it is the view of the Court that a judge must be thickskinned or just thickheaded, but nothing in my experience or observation confirms the idea that he is insensitive to publicity. Who does not prefer good to ill report of his work? And if fame – a good public name – is, as Milton said, the 'last infirmity of noble mind,' it is frequently the first infirmity of a mediocre one."

Craig v. Harney, 331 U.S. at 396 (Jackson, J., dissenting).

The automatic reversal rule of *Tumey* should not therefore be limited to pecuniary interest cases. Review is required to establish that, when the intensity of media criticism tempts a judge to rule in a certain way, and that judge indicates (on the record or otherwise) his or her concern with that media criticism, reversal under *Sullivan v. Louisiana* is automatic. In such circumstances, there should be no harmless error analysis in which a reviewing court (as the Court of Appeal did in petitioner's case)

examines whether the sentence "actually rendered . . . was surely unattributable to the error." *Sullivan v. Louisiana*, 113 S.Ct. at 2082. This Court has held that such analysis is not appropriate when the bias is pecuniary. The Court should grant review to establish that such analysis is equally inappropriate when the bias arises from media pressure.

Under *Sullivan* and *Tumey*, petitioner should only have been required to show that Judge McInerny responded to influences that might have "led him not to hold the balance nice, clear, and true between the state and the accused. . . . " Surely, the intense publicity, and the judge's continuing debate with the press from the bench, established this much.

CONCLUSION

Petitioner respectfully requests the Court to grant the petition for a writ of certiorari and reverse the decision below.

Respectfully submitted,

LAWRENCE A. GIBBS
GROSSMAN & GIBBS
1510 Fourth St.
Berkeley, CA 94710
(510) 524-4141
Counsel for Petitioner

APPENDIX A

NOT TO BE PUBLISHED IN THE OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE,

Plaintiff and
Respondent,

v.

NICHOLAS DALIS, et al.,

Defendants and
Appellants.

H011418
Santa Clara County
Super.Ct.No. 113703

(Filed Feb. 20, 1996)

This action arises from an investigation into the operation of a card club in San Jose, incorporated as Garden City, Inc. The corporation, and 11 officers and employees were named as defendants. In a trial by the court Gary Rovai and Henry Schiro were each found guilty of filing fraudulent tax returns and conspiracy to violate state and local campaign contribution laws. (Rev. & Tax. Code, § 19405; former Pen. Code, § 182.1; Gov. Code, § 84302; San Jose Mun. Code, §§ 2.21.030, 2.21.040, 2.21.120, 2.21.130.) They appeal, contending the evidence seized at the search of the Garden City Card Club should have been suppressed and there was insufficient evidence they intended to violate campaign contribution laws. Nicholas (Nick) Dalis pled guilty to conspiracy to defraud, grand theft, tax evasion and conspiracy to violate campaign laws. (Pen. Code, § 487; Rev. & Tax. Code, §§ 19405, 25961.) On appeal he contends he was deprived of due

process of law because the sentencing proceedings were fundamentally unfair. We affirm the judgments.

FACTUAL BACKGROUND

Garden City is a cardroom and appurtenant restaurant located in San Jose. The business was established as Garden City Card Club in 1948 by appellant Dalis's father, and co-defendants Chris and Louis Dalis. The business eventually grew into northern California's largest card room. Appellant Dalis's father died in 1969.

In 1975, appellant Dalis was elected president and chairman of the board of Garden City, Inc. Co-defendants Chris (appellant's uncle) and Carmella (appellant's mother) became vice presidents, John Weingarten became secretary, Philip Harris became treasurer, and Deborah Dalis-Smith (appellant's sister) became the assistant secretary. Henry Schiro and Gary Rovai held positions as director of operations and cardroom manager respectively.

In order to build a new cardroom and restaurant,[1] the Dalis family approached Ernest Pestana, a real estate developer. Pestana agreed to purchase the property, construct a facility and lease it to Garden City. In January of 1976, Ernest Pestana entered into an agreement with Garden City, Inc. wherein he would acquire a ten percent interest in the corporation and lease the premises for a monthly rent.

---

[1] The original building occupied by Garden City was condemned in 1973.

In the summer of 1976, appellant Dalis attended a dinner meeting with his uncle Chris and John Weingarten. He was informed that they were in a cash business and, as in all cash businesses, some cash is skimmed. He was told that because he was in charge of the day to day operations, he would handle the skim. Appellant agreed.

The skim initially included Nick Dalis, Chris Dalis, John Weingarten, Phil Harris, Henry Schiro, Gary Rovai, bookkeeper Billie Flores, and Bill Benevento, a former casino manager and Gary Rovai's uncle. Nick's mother and certain employees were later added to the skim.

In 1977, appellant Dalis skimmed approximately $4,250 per week. This amount escalated until 1985, when $12,250 was skimmed per week. In 1977, weekly payments of $150 were made to Henry Schiro and Gary Rovai. These payments increased over the years to $1,000 per week in 1985. By 1985, Nick Dalis was personally taking $1,500 per week from the business. None of these payments were reported by anybody on their income tax returns.

In 1985, Nick Dalis began taking more cash from the business than his uncle Chris; in the early part of the year he took an additional $40,000. When this was discovered, he was told to resign as president.

On August 27, 1985, Henry Schiro told Ernest Pestana that Nick Dalis was "out of control" and that board members were receiving cash from a profit skimming operation. Pestana called a board meeting to protest. Various board members admitted to the skim, and Pestana subsequently was reimbursed $250,000.

Rumors of financial irregularities at Garden City began to spread. In 1986, search warrants were served at several locations including the Garden City facility and the home of appellant Dalis. Documents seized as a result of these searches disclosed that a total of $3,904,400 had been taken from Garden City. Additional computer printouts found at the Garden City facility revealed that various officers and employees had been reimbursed by the corporation for campaign contributions to local politicians in violation of campaign contributions law.

DISCUSSION

Suppression Motion

The charges against appellants Rovai and Schiro were based on evidence seized during the search of the Garden City facility pursuant to a search warrant. The warrant authorized the search of "Garden City Incorporated, 360 South Saratoga Avenue, San Jose . . . which premises consist of: a gambling club restaurant, and business office at said address; for the following property: 1. Business records pertaining to the operation of Garden City Incorporated, including any and all payroll records from January 1, 1982 to current date."

In their motion to suppress the evidence seized from their offices at the Garden City facility, appellants Rovai and Schiro argued inter alia that the warrant was overbroad, and the facial defects of the warrant were not cured by the good faith exception established in *United States v. Leon* (1984) 468 U.S. 897. In opposition to the motion, the People took the position that appellants lacked standing to object to the search, since a San Jose

ordinance governing card clubs expressly authorized warrantless searches and seizures of card club records.

After a full evidentiary hearing, the court concluded appellants had a reasonable expectation of privacy in the second floor of the Garden City facility where their offices were located. It also found that while the warrant was overbroad, the officers acted in good faith reliance on the warrant under *Leon*. Accordingly, the motion to suppress was denied.

On appeal Rovai and Schiro contend the court misapplied *Leon*. In response, the People reassert that appellants lack standing to challenge the search of the card club and seizure of corporate records. We agree with the People.

We preliminarily note that this court's review of the trial court's ruling on a motion to suppress evidence is confined to the correctness of the lower court's ruling, not the reasons for its ruling. (*People v. Dimitrov* (1995) 33 Cal.App.4th 18, 27.)

To establish "standing" to contest the admissibility of the Garden City business records pursuant to Fourth Amendment protections under the United States Constitution, appellants Rovai and Schiro must show they had a legitimate expectation of privacy with respect to the particular areas searched or documents seized. (*Rakas v. Illinois* (1978) 439 U.S. 128, 143; *People v. McPeters* (1992) 2 Cal.4th 1148, 1171.)

The touchstone of Fourth Amendment analysis is the question whether a person has a constitutionally protected reasonable expectation of privacy; "[t]he Amendment does not protect the merely subjective expectation of privacy, but only those 'expectation[s] that society is prepared to recognize as "reasonable." ' [Citations.]" (*Oliver v. United States* (1984) 466 U.S. 170, 177.)

Within the workplace context, the United States Supreme Court has recognized that employees may have a reasonable expectation of privacy against intrusions by police. (See *Mancusi v. DeForte* (1968) 392 U.S. 364.) This expectation of privacy in one's place of work is also based on what society recognizes as reasonable. (*O'Connor v. Ortega* (1987) 480 U.S. 709, 716.) An employee's expectation of privacy must be assessed in the context of the employment relationship; expectations of privacy may be reduced by office procedures or by legitimate regulation. (*Id.* at p. 717.)

The high court has acknowledged that limitations on privacy exist in certain "closely regulated" industries. (*New York v. Burger* (1987) 482 U.S. 691, 700.) "Certain industries have such a history of government oversight that no reasonable expectation of privacy. . . could exist for a proprietor over the stock of such an enterprise. . . . [W]hen an entrepreneur embarks upon such a business, he has voluntarily chosen to subject himself to a full arsenal of governmental regulation." (*Marshall v. Barlow's, Inc.* (1978) 436 U.S. 307, 313.)

At all relevant times, San Jose had an ordinance governing the operation of cardrooms. Former section

6212.20, subdivision (v)[2] provided in pertinent part: "All card clubs shall be open for inspection during all normal business hours to the Chief of Police or his duly authorized representatives without search warrant, who may seize any evidence of any violation of this Part without a search warrant or other legal process."

At the hearing on the motion to suppress, appellants Rovai and Schiro relied primarily on *Mancusi v. DeForte, supra,* 392 U.S. at p. 364, to support the argument that they had standing to challenge the search of the second floor of the Garden City facility. The only way to get to the second floor of the building where appellants' offices were located was to enter through a locked door.

Appellants took the position that the San Jose city ordinance did not defeat their legitimate expectation of privacy which they had in the Garden City offices. They maintained that the ordinance was unconstitutional on its face for two reasons. First, they argued the Garden City business was not one of those "closely regulated" businesses subject to warrantless searches. Second, they asserted the San Jose ordinance did not sufficiently limit the time, place and scope of the warrantless searches. We reject both these contentions.

California has legislatively authorized warrantless search and inspections of certain "closely regulated" industries. (See, e.g., *People v. Calvert* (1993) 18

---

[2] The San Jose Municipal Code was amended in 1992. Unless otherwise indicated, all further statutory references refer to the San Jose Municipal Code in effect at the time the Garden City facility was searched.

Cal.App.4th 1820, 1827-1836 [auto repair industry]; *People v. Doss* (1992) 4 Cal.App.4th 1585, 1597-1598 [pharmacy industry]; *People v. Paulson* (1990) 216 Cal.App.3d 1480, 1484-1490 [liquor industry]; *People v. Firstenberg* (1979) 92 Cal.App.3d 570 [nursing homes]; *Miller v. Obledo* (1978) 79 Cal.App.3d 714 [Medi-Cal providers].)

To constitute a valid warrantless search of a regulated industry, three criteria must be met: "First, there must be a 'substantial' government interest that informs the regulatory scheme pursuant to which the inspection is made. . . . [¶] Second, the warrantless inspections must be 'necessary to further [the] regulatory scheme.' . . . [¶] Finally, 'the statute's inspection program, in terms of the certainty and regularity of its application, [must] provid[e] a constitutionally adequate substitute for a warrant.' . . . In other words, the regulatory statute must perform the two basic functions of a warrant: it must advise the owner of the commercial premises that the search is being made pursuant to the law and has a properly defined scope, and it must limit the discretion of the inspecting officers. [Citation.] To perform this first function, the statute must be 'sufficiently comprehensive and defined that the owner of commercial property cannot help but be aware that his property will be subject to periodic inspections undertaken for specific purposes.' [Citation.] In addition, in defining how a statute limits the discretion of the inspectors, we have observed that it must be 'carefully limited in time, place, and scope.' [Citation.]" (*New York v. Burger, supra,* 482 U.S. at pp. 702703; see also, *People v. Calvert, supra,* 18 Cal.App.4th at p. 1827.)

There is no question that the three criteria are present in this case. First, gaming has been regulated in California since at least 1853. (See *Carrier v. Brannan* (1853) 3 Cal. 328, 329.) It is currently regulated by "The Gaming Registration Act" (Act). (Bus. & Prof. Code, § 19800, et seq.) One purpose of the Act is to prevent criminal dishonesty in the operation of the gaming clubs. (See, e.g., Bus. & Prof. Code, §§ 19809, subd. (a)(4); 19810, subd. (a)(1)&(4) [registration can be denied or revoked if card club engages in criminal dishonesty, or fails to take reasonable steps to prevent dishonest acts or illegal activities by licensed employees].) The Act expressly grants broad authority to city and county governments to enact gaming club regulations which are not inconsistent with the Act. (Bus. & Prof. Code, §§ 19801, 19824.) San Jose obviously has a substantial interest in precluding illegal activities in local cardrooms.

Second, warrantless searches are necessary to further the regulatory scheme. As the U. S. Supreme Court has pointed out, violations of law that can be quickly concealed, such as the theft of cash, can only be deterred by frequent and unannounced inspections. "In this context, the prerequisite of a warrant could easily frustrate inspection; and if the necessary flexibility as to time, scope, and frequency is to be preserved, the protections afforded by a warrant would be negligible." (*United States v. Biswell* (1972) 406 U.S. 311, 316; see also, *New York v. Burger, supra,* 482 U.S. at p. 710.)

Third, San Jose's ordinance provides a constitutionally adequate substitute for a warrant. The ordinance is comprehensive in its regulation of cardrooms. Pursuant to section 6212.20, subdivision (v), eight copies of the

ordinance including the provision regarding warrantless searches, were posted at various locations in the Garden City facility. The club employed a compliance officer whose job was to ensure the Garden City employees knew the rules and regulations that applied to cardrooms.

Lastly, the ordinance is carefully limited in time, place and scope. Searches are confined to the cardroom premises during normal business hours for the purpose of seizing evidence of ordinance violations.

Our conclusion that gambling and card clubs is a "closely regulated" industry wherein restrictions on privacy may exist comports with the holdings in sister jurisdictions. (See e.g., *There To Care v. Com'r of Indiana Dept. of Revenue* (7th Cir. 1994) 19 F.3d 1165, 1167; *Barrington Fair Ass'n Inc. v. Racing Com'n* (1989) 27 Mass.App.Ct. 1159 [539 N.E.2d 554, 555]; *In re Martin* (1982) 90 N.J. 295 [447 A.2d 1290, 1299].)

We are somewhat puzzled by the trial court's finding that appellants Rovai and Schiro had an expectation of privacy in the second floor of the Garden City facility. Although the ordinance provided that the playing of all card games was confined to the first or ground floor of each permitted card club (§ 6212.20, subd. (k)), the ordinance defines "cardroom" as "any building or structure or any portion of a building or structure." (§ 6212.1, subd. (c).) Moreover, section 6212.20, subdivision (v) refers to "all card clubs," a term not limited to the ground floor where games may be played. We find appellants had no legitimate expectation of privacy with respect to corporate records located on the second floor. As the U.S.

Supreme Court has observed, businessmen engaged in licensed and regulated enterprises must accept the burdens as well as the benefits of their trade; "[t]he businessman in a regulated industry in effect consents to the restrictions placed upon him." (*Almeida-Sanchez v. United States* (1973) 413 U.S. 266, 271.) Accordingly, appellants lacked standing to challenge the search of the Garden City facility.

Conspiracy to Violate Campaign Laws

In early 1977, various principals in Garden City, Inc. decided it was essential to become politically active in the community. Because campaign contributions were limited to $250 per contributee, it was agreed that the corporation would reimburse individuals for contributing to political campaigns. Appellant Dalis requested that appellants Rovai and Schiro make contributions to specific candidates. They were then reimbursed for the contributions they made. Reimbursements were made in cash. Annual reimbursements from Garden City, Inc. to various individuals totaled from $13,000 to $78,000 per year from 1977 to 1985. A portion of these funds went to Rovai and Schiro.

The practice of repaying individuals for campaign contributions continued after Dalis was no longer President. Appellant Schiro was in charge of reviewing campaign contributions. Reimbursements were made by checks prepared by Deborah Dalis-Smith pursuant to directions by Ernest Pestana or appellant Schiro. The checks were disguised as payroll payments. Payroll records indicated a false gross amount was determined,

deductions were made for taxes, and individual employees were paid a net amount representing the amount he or she had contributed to campaigns. In order to avoid an individual exceeding legal limits to a specific campaign, a ledger was kept of all contributions. The ledger was kept in Schiro's office.

There was evidence that Michael Faber was running for city council in 1986. During the campaign appellant Schiro called and asked Faber if he wanted a contribution. Upon receiving an affirmative response, Schiro inquired whether Faber was familiar with Garden City. After Faber stated he had nothing against card clubs, Schiro informed him that ten Garden City employees would each contribute $99.[3] Faber received the ten checks in a single envelope a short time later.

In 1985, appellant Schiro assisted in raising money for Tom McEnery's mayorial campaign. Schiro indicated he would contact people who might be willing to contribute. McEnery's campaign manager returned ten checks, each for $99, to Schiro. She thought there was some misunderstanding that if the checks were for this amount they would not be reported. She was also concerned about the number of individuals who were from the same family in view of the $500 limit for individual contributions.

---

[3] Faber explained it was common to receive $99 contributions. Many businesses do not want their names reported, since they contribute to both Democratic and Republican candidates.

In 1986, Schiro telephoned Elizabeth Bryant, campaign manager for the Sheriff Winter Committee, to complain that the committee had reported the $2,144 in contributions he had delivered as having been donated by Schiro as an individual. He personally had donated only $99.

On appeal Rovai and Schiro contend there is no evidence that they specifically intended to violate Government Code section 84302[4] or San Jose Municipal Code sections 2.21.030, 2.21.040, 2.21.120 or 2.21.130.[5] They submit there is nothing in the record to indicate that either intended to violate the statutes, nor that they were even aware of them. Therefore, they conclude there is insufficient evidence to support their convictions of conspiracy to commit a crime under former Penal Code section 182.1.

It is settled that conspiracy is a "specific intent" crime. "The specific intent required divides logically into two elements: (a) the intent to agree, or conspire, and (b) the intent to commit the offense which is the object of the conspiracy. [Citations.]" (*People v. Horn* (1974) 12 Cal.3d

---

[4] Government Code section 84302 provides in relevant part: "No person shall make a contribution on behalf of another, or while acting as the intermediary or agent of another, without disclosing to the recipient of the contribution both his own full name and street address, occupation, and the name of his employer, if any, or his principal place of business if he is self-employed, and the full name and street address, occupation, and the name of employer, if any, or principal place of business if self-employed, of the other person."

[5] These city code sections limit contributions to incumbents and candidates for political office. The limit for council members is $250; the limit for mayor, $500.

290, 296.) Appellants' contention is primarily based on the rule that to uphold a conviction for conspiracy to commit a "public welfare offense" there must be a showing that the accused knew of the law and intended to violate it. (*People v. Marsh* (1962) 58 Cal.2d 732, 743.)

However, appellants' claim is still governed by established standards of review. "The test on appeal for determining if substantial evidence supports a conviction is whether a reasonable trier of fact could have found the prosecution sustained its burden of proving the defendant guilty beyond a reasonable doubt. In making this determination, we must view the evidence in a light most favorable to respondent and presume in support of the judgment the existence of every fact the trier could reasonably deduce from the evidence." (*People v. Iniguez* (1994) 7 Cal.4th 847, 854, quotations and citations omitted.)

As with other elements of a crime, the intent to commit a specific offense may be inferred from circumstantial evidence. (*People v. Colantuono* (1994) 7 Cal.4th 206, 221, fn. 12; *People v. Austin* (1994) 23 Cal.App.4th 1596, 1606.) Sufficient circumstantial evidence exists in this case to support the verdict.

First, the fact that individual contributions to various campaigns were $99 rather than $100 suggests the contributors were fully aware that political recipients of their contributions were legally required to report the name, address, occupation, and employer's name for each contributor of $100 or more. (See Gov. Code, § 84211, subd. (f).)

Second, there was uncontroverted evidence that a ledger was kept for each individual's contribution to avoid exceeding limitations for specific offices. This procedure indicates an awareness of statutory limitations for contributions and an intent to appear to comply with the codes.

Third, reimbursements to Rovai and Schiro were disguised as payments for work they had not performed. If they had thought the reimbursements from Garden City were lawful, it is doubtful they would have allowed the corporation to pay withholding taxes on the payments.

Finally, Rovai and Schiro assert that on February 9, 1982, the San Jose City Council amended section 2.21.080 to specify that violation of the campaign contribution laws was not a penal offense.[6] The assertion lacks merit.

The adoption of additional civil remedies in 1982 did not repeal the criminal sanctions. Rather, it created civil remedies in addition to criminal sanctions.[7] The city council made this doubly clear in 1984 by enacting section 1.080.010, subdivision (F) which provides: "The remedies specified in this section are in addition to and

---

[6] The amendment provided: "A. *Civil Penalty Enforcement.* The City Attorney, or such individual as the City Attorney may appoint, may bring a civil action to enforce the provisions of this Chapter and may seek damages for violations of this Chapter as specified in subsections B and C hereunder."

[7] In 1982, section 1.08.010 provided in pertinent part: "Any person violating any of the provisions or failing to comply with any of the mandatory requirements of this code or of any ordinance of the city, other than administrative provisions thereof, shall be guilty of a misdemeanor, unless the violation of such provision is designated as an infraction."

do not supersede or limit any other remedies, civil or criminal." Moreover, it is undisputed that a violation of Government Code section 84302 constitutes a misdemeanor. (Gov. Code, § 91000.)

Sentencing of Nick Dalis

Nick Dalis pled guilty to conspiracy to defraud Pestana, grand theft from Pestana, nine counts of tax evasion, and conspiracy to violate campaign laws. On February 25, 1993, several defendants appeared for sentencing. Because of his advanced age and medical condition, the court found there were unusual circumstances that made Chris Dalis eligible for probation. John Weingarten, Philip Harris, and Deborah Dalis-Smith were also placed on probation due to age and/or health considerations.

When the court addressed the question of appellant Dalis's sentence, it indicated it initially was uncertain as what to do. The prosecutor indicated appellant was statutorily ineligible for probation, since Dalis had taken more than $100,000 and there were no unusual circumstances to justify probation pursuant to Penal Code section 1203.045 and California Rules of Court, rule 413 (c). Upon being asked what unusual circumstances were present for Dalis, defense counsel argued that if the advanced age of several defendants constituted an unusual circumstance, Dalis's youth could be considered.

The court stated that if sentence were to occur at that point, it would place Dalis on probation. The court indicated it was contemplating a harsh form of probation where Dalis would be away from his home for 12 months,

working in "humiliating" and onerous circumstances. The court announced it had considered sending Dalis to Somalia, which was too dangerous; the Peace Corp would probably have nothing to do with Dalis; and Habitat was unsuitable, since Dalis would merely be building projects in Hawaii. The court requested counsel to assist in formulating an appropriate form of probation. Because Dalis's attorney had previously requested the right to a formal hearing, sentencing was continued.

The following day, and for weeks after, the San Jose Mercury News carried stories criticizing the probationary sentence. The newspaper observed that years of political and charitable contributions, volunteerism, and rubbing elbows with the right crowd had paid off. The trial judge was admonished for engaging in two standards of justice, one for the rich and one for the poor. One article noted that the judge's peers on the bench were sharply critical of his reasoning. They felt his remarks were insensitive to the concept of equal justice for the rich and poor.

On April 27, 1993, the court conducted a formal sentencing hearing. At the commencement of the hearing, Dalis's counsel expressed the view that his client had been sentenced to probation on February 23rd. The district attorney took the position that the court had merely explored sentencing alternatives, but had not imposed sentence in February. The court agreed. Thereafter, various witnesses testified on Dalis's behalf.

From April 28 until May 9, the press renewed its criticism of probation for Dalis. One article ridiculed testimony which described Dalis as an ideal role model for children and a pillar of the community whose support

of charitable causes and the arts had never wavered. Another article pointed out the harm Dalis had caused to the political system by conspiring to avoid the local campaign laws.

On May 10, 1993, the court denied probation and sentenced Dalis to a term of three years. The court then stated: "I'm sending you to prison Mr. Dalis for a very simple reason, the size and the magnitude and the number and the length of your offenses has convinced me that the only really appropriate sentence for you, is incarceration at the state level." The court further explained: "You can well wonder why I've changed my mind and it's very simple. I knew almost as I was musing that day on the 25th in open court that I was making a mistake. The language that I used when I read it myself shows me to myself, that I was struggling with the concepts and I was beginning to realize that I was making a mistake. [¶] What I did in simple terms was I was looking too closely at you, the man, and I was not looking closely enough at the crimes. And Mr. Finkelstein [district attorney] said it this morning as he usually is much more loquacious than I am, there are some crimes that just mandate prison."

The court then discussed the influence of the media on his sentencing choice. "[T]he editor of the editorial pages of the San Jose Mercury and the columnist who has indicated such a very great interest in you, could not influence me to pick a particular flavor of a jelly bean out of a candy dish much less whether I send you to prison or not."

On appeal Dalis contends it is reasonably probable the negative press coverage of the February 25, 1993

hearing by the Mercury News prejudicially influenced the court's final sentencing decision. He maintains the media "barrage" was intense. Moreover, the judge took note of the media's accusations and addressed them in court. He concludes that the appropriate remedy is to give him the benefit of the sentence the court intended on February 25.

It is undisputed that a criminal defendant is entitled to due process of law during the sentencing process. (*Gardner v. Florida* (1976) 430 U.S. 349, 358.) "[A]n applicant for probation is . . . entitled to relief on due process grounds if the hearing procedures are fundamentally unfair." (*People v. Peterson* (1973) 9 Cal.3d 717, 726; *People v. Edwards* (1976) 18 Cal.3d 796, 802; *People v. Read* (1990) 221 Cal.App.3d 685, 689-690.)

Appellate review of whether a particular proceeding comports with the demands of due process is settled. "[T]he United States Supreme Court has recognized for many years that the very character of certain procedures make it impractical to establish the degree of prejudice which has resulted therefrom. [Citation.] In these circumstances the defendant need not show that he was *actually* prejudiced during his trial in order to establish a denial of due process of law; it is enough if he can show there was a reasonable *probability* of prejudice. [Citations.]" (*Gordon v. Justice Court* (1974) 12 Cal.3d 323, 329; *People v. Santamaria* (1991) 229 Cal.App.3d 269, 280.)

With respect to evaluating the influence of the press on the judicial process the U. S. Supreme Court noted: "Due process requires that the accused receive a trial by an impartial [trier of fact] free from outside influences.

Given the pervasiveness of modern communications and the difficulty of effacing prejudicial publicity from the mind[] of [the trier of fact], the trial courts must take strong measures to ensure that the balance is never weighed against the accused. *And appellate tribunals have the duty to make an independent evaluation of the circumstances."* (*Sheppard v. Maxwell* (1966) 384 U.S. 333, 362, emphasis supplied; see also *People v. Sirhan* (1972) 7 Cal.3d 710, 730.) It is with this standard that we review the proceedings below.

Initially one might believe there was a reasonable probability the trial judge had been influenced by the adverse publicity by the Mercury News. However, when all the facts are considered, we must conclude otherwise.

At the time of the February 25 hearing, the court had received and read hundreds of letters which were favorable to Dalis and recommended leniency in his sentence. The court expressed the view that Dalis did not belong in prison, since he was not a danger to the community. However, the court clearly intended to impose a difficult form of probation. It did not want appellant to remain at home.

The court's intention to exile Dalis to some place such as Somalia was obviously unreasonable. It is settled that the sentencing court has no inherent authority to fashion ad hoc penalties for crimes. (*People v. Montano* (1992) 6 Cal.App.4th 118, 123.)

More importantly, Penal Code, section 1203.045 mandates a prison term for persons convicted of thefts in excess of $100,000, "[e]xcept in unusual cases where the interests of justice would best be served if the person is

granted probation." At the February 25 hearing, defense counsel argued appellant's age and the influence of his elders constituted an unusual circumstance. The argument was feeble. At the time Dalis was elected president of Garden City, Inc. he was 28. He continued to commit the charged offenses for the next eight years. Appellant's youth could not be a credible basis for granting probation. Though the trial court stated it did not consider Dalis completely ineligible for probation on May 10, it offered no basis for granting probation and none exists in the record.

Based on these facts, we conclude it is not reasonably probable the media influenced the judge's sentencing decision. Rather, as he admitted on May 10, the judge realized he had made a mistake at the February 25th hearing. Accordingly, he imposed the sentence proscribed by law.

DISPOSITION

The judgments are affirmed.

Mihara, J.

WE CONCUR:

Cottle, P.J.

Elia, J.

People v. Dalis
H011418

APPENDIX B

IN THE COURT OF APPEAL OF THE
STATE OF CALIFORNIA

SIXTH APPELLATE DISTRICT

THE PEOPLE Plaintiff and Respondent, vs. NICHOLAS JOHN DALIS, et al., Defendants and Appellants.	No. H011418 Superior Court No. 113703 (Filed March 6, 1996)

BY THE COURT*

Appellant Dalis' petition for rehearing is denied.

Dated MAR 6 1996

/s/ COTTLE, P.J.

* Before Cottle, P.J., Elia, J., and Mihara, J.

APPENDIX C

Sixth Appellate District No. H011418
S052618

IN THE SUPREME COURT OF CALIFORNIA

THE PEOPLE, Respondent

v.

NICHOLAS DALIS Et Al., Appellants

(Filed May 15, 1996)

Appellants' petition for review DENIED.

/s/ George
Chief Justice